Supreme Court, U.S.
FILED
OCT 19 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 709

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEUBERGER, RHODA SEIDEL, and BARBARA SHACK,

Petitioners,

against

WILLIAM CAHN, District Attorney, Nassau County and, EUGENE NICKERSON, County Executive, Nassau County,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CAHN'S BRIEF IN OPPOSITION

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Question Presented

Whether this case is of such imperative public importance as to warrant the extraordinary relief of certiorari prior to judgment despite the fact that the appeal by respondent District Attorney is before the United States Court of Appeals for the Second Circuit.

Statement

The facts of the case are stated fully in the opinions of the United States District Court for the Eastern District of New York (Petitioners' Appendix, at pp. 1a-18a).

Argument

Petitioners instituted an action in the District Court challenging the constitutionality of New York's General Business Law § 136(a) *if* it proscribed the display or distribution of an emblem consisting of a circular representation of what appears to be a portion of the American flag on which is superimposed the peace symbol.* Petitioners requested a declaration that the display or distribution of the emblem is constitutionally protected conduct and that the statute is unconstitutional *to the extent* that it purports to authorize prosecution for the display or distribution of the emblem.

On June 22, 1970, the District Court, sitting as a three-judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284, declared: "that properly applied, section 136(a) is not unconstitutional; that the particular symbol affixed to the complaint whether worn, displayed or distributed does not come within the purview of section 136(a); and that any such wearing, display or distribution does not constitute a crime as defined therein" (Petitioners' Appendix, at p. 13a). Petitioners thus obtained the relief they requested and, therefore, did not file a notice of appeal; and, of course, their time to appeal would have long since elapsed in any event.

However, on July 10, 1970, respondent Cahn filed a notice of appeal to the Court of Appeals for the Second Circuit. In his brief, which was filed on September 28,

*The emblem is reproduced in Petitioners' Appendix, at p. 14a.

1970, respondent argues that the District Court should have abstained since it found the challenged statute susceptible of a construction which avoided petitioners' constitutional challenge and, in the alternative, that if the statute proscribes the emblem in question, it is a legitimate exercise of the State's power to protect the integrity of the American flag.

Although petitioners prevailed in the District Court, their petition for certiorari prior to judgment might have some basis if they were seeking affirmance of the District Court's judgment. The fact of the matter is, however, that petitioners seek *reversal* of that judgment. In other words, petitioners contend that because respondent Cahn has appealed to the Court of Appeals they may employ the remedy of certiorari prior to judgment as a vehicle for seeking reversal of a judgment which granted them the relief they sought! Such a petition is without precedent.

If, as a result of the decision of the Court of Appeals petitioners should become aggrieved parties, they will have ample opportunity to petition for certiorari. And, if certiorari is then granted, this Court will have the benefit of the Court of Appeals' consideration of the issues in the case.

Since petitioners acknowledge that respondent Cahn has respected his pledge to refrain from prosecuting petitioners pending the outcome of this case (Petition, at p. 6), it is evident that time is not of the essence. Indeed, the claim of urgency is belied by the fact that petitioners have waited more than two months from the date respondent filed his notice of appeal before they filed their petition. Moreover, the fact that counsel for petitioners allege that they represent more than 40 persons in the City of New York who have been arrested for displaying the emblem in question is of no consequence. The petition makes no mention of the status of those alleged arrests, their statutory basis, whether they occurred within the jurisdiction

of the District Court, or what, if any, attempts have been made to seek redress in the State courts. In any event, a determination of the issues in this case by the Court of Appeals may very well resolve the legitimacy of those alleged arrests, and that determination will be the law throughout the State.

In sum, the petition appears to be no more than an attempt to circumvent the jurisdictional rule enunciated by this Court in *Mitchell* v. *Donovan* —— U. S. ——, 38 U.S.L.W. 4514 (June 15, 1970), concerning appeals from orders of three-judge district courts neither granting nor denying an injunction.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, October 13, 1970.

Respectfully submitted,

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